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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. [redacted] 1281

WALTER F. TELLIER,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WALTER F. TELLIER, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on May 6, 1958.

OPINIONS BELOW

The opinion and dissenting opinion in the court below (Appendix A, *infra,* pp. A1-A24) have not yet been reported.

JURISDICTION

The judgment of the court below (Appendix B, *infra,* pp. A25-A26), was entered on May 6, 1958. A

petition for rehearing and for rehearing en banc was denied on May 28, 1958 (Appendix B, *infra*, p. A26). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether an attorney, by the act of orally warning his client against imprudent and unlawful action, is placing himself in the position of becoming over objection the principal witness against the client whom he had warned, simply because, after the warning, he sends the client a letter for transmission to others that effectively waters down and in significant aspects does not repeat what he told his client orally.

2. Whether a privileged private conversation between attorney and client ceases to be privileged because, after the conversation, the attorney sends the client a letter for transmission to others that relates to the general subject matter of the conversation, but in greatly subdued and substantially different terms.

3. Whether books and records of a corporation, not shown to have been kept in the regular course of business as explicitly required by 28 U.S.C. § 1732(a), are admissible against one who was neither an officer, nor a director, nor in control, of the corporation.

STATUTE AND RULE OF COURT INVOLVED

1. Rule 26 of the Federal Rules of Criminal Procedure is as follows:

> **"Rule 26. Evidence**
>
> "In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency

and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

2. Section 1732(a) of Title 28, U. S. Code, as amended, is as follows:

"§ 1732. Record made in regular course of business; photographic copies

"(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

"All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

"The term 'business,' as used in this section, includes business, profession, occupation, and calling of every kind."

STATEMENT

In view of the limited number of issues presented in this petition, there are set forth below only sufficient facts to place those issues in their proper setting.

Preliminary Summary. Alaska Telephone Corporation (hereinafter A.T.C.), an Alaska corporation that owned telephone exchanges and power plants in the Territory Alaska, needed funds for various corporate purposes. Petitioner acted as underwriter in selling to the public, at various times between September 1951 and the spring of 1955, four separate series of the corporation's convertible debentures. The present charges grow out of the sale of these debentures.

Petitioner was indicted in a 36 count indictment (644a-686a) * originally filed on December 1, 1955 (1a). Eighteen counts (Nos. 1, 3, 5, 7, 9, 11, 13, 15, 16, 19, 20, 22, 24, 28, 30, 32, 34, 35) separately charged a violation of Section 17(a) of the Securities Act of 1933 (15 U.S.C. § 77q(a)). Seventeen other counts alleged mail frauds in violation of 18 U.S.C. § 1341. The last count (No. 36) alleged a conspiracy to violate both statutes, contrary to 18 U.S.C. § 371.

Petitioner was found guilty by a jury on all counts (624a), and was sentenced to four and a half years' imprisonment and to pay a total fine of $18,000 (687a-688a). On appeal to the court below, the judgment was affirmed (Appendix A, *infra,* pp. A1-A19), Judge Lumbard voting to reverse petitioner's conviction because the trial court permitted the Government's witness Cahn, an attorney, to testify to a confidential con-

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* References to figures with the suffix "a" are to the printed Appendix filed in the court below by petitioner and his co-appellant Proctor. References to the transcript of testimony, filed here in unprinted form pursuant to Rule 21(3), are prefaced by "Tr." The Appendix filed by the United States below, which included no testimony and contained 64 exhibits, 35 of which duplicated exhibits already set forth in full in petitioner's Appendix, is not separately referred to in the present Petition.

versation he had with the petitioner, who was then his client (*infra*, pp. A19-A24).

Two individuals, Elton B. Jones and Albert J. Proctor, were named as co-defendants with petitioner, and were likewise convicted on all counts (624a). Both were given much more lenient sentences, which were suspended (3a; 634a-636a; 688a-689a). Jones did not appeal; Proctor appealed, the judgment against him was also affirmed, though without dissent (*infra*, pp. A1-A24); he has not joined in the present petition.

Also indicted with the three individual defendants was the corporation, A.T.C. (644a), which was put on trial, although it never appeared and was unrepresented by counsel (1a-2a; 5a-8a). No verdict was ever found against A.T.C. (3a, 624a), but it was none the less sentenced and fined, on the trial court's theory (4a) "that verdict against Defts. Jones and Proctor may be treated as a verdict against Corporation."

The judgment that petitioner asks this Court to review was entered at the second trial of all defendants. The first trial resulted in a disagreement of the jury (2a).

The four series of A.T.C. debentures mentioned above, which were lettered from A to D, were dated respectively, August 1, 1951; April 1, 1953; April 1, 1954; and December 1, 1954. Each series was sold before the one following was offered for sale. The facts underlying the several transactions were these:

Events before Series A. In April 1951, representatives of A.T.C., seeking to raise capital (Tr. 2090-2099), approached petitioner, who at the time had been

in the securities business for 25 years (Tr. 2080-2083). Petitioner retained, as his counsel, Bernard Cahn, a former SEC lawyer (8a, 170a), to attend to all necessary legal details (11a-22a). John R. Peddy represented A.T.C. as its attorney (15a, 21a, 32a).

After full discussions, the A.T.C. representatives and petitioner finally agreed that an issue of convertible debentures, bearing monthly interest, would be sold, and that the issue would be brought out under SEC Regulation A, which exempts issues under $300,000 in any one year from full registration requirements (22a-30a, 87a; Tr. 537). A.T.C. did not have the funds necessary for full registration (425a; Tr. 383-386). A best efforts underwriting agreement was signed with petitioner (Govt. Ex. 2), Proctor signing as Secretary of A.T.C., under which petitioner's fee was to be 20 percent plus certain expenses (31a-32a).

The figures presented by the A.T.C. representatives showed that their company had had net earnings in 1948, 1949, and 1950 (30a). Using those figures, Cahn as attorney for petitioner, and Peddy as attorney for A.T.C., prepared the offering circular for Series A (35a). As Peddy was not experienced in SEC matters, Cahn did most of the writing (36a). The draft of the offering circular was submitted to the Washington office of the SEC (43a, 49a); that agency's comments were communicated to A.T.C. (45a), and its suggestions were fully adopted by A.T.C. (Tr. 387-389, 401-404, 406-409-A). Because of A.T.C.'s lack of funds, no independent audit was made in connection with Series A (46a-47a). The debentures were provided for by an indenture of A.T.C. (Govt. Ex. 4), under which Colonial Trust Co. of New York was trustee for the purpose, among others, of the payment of the interest

(49a-50a). While the issue was pending, petitioner purchased for $24,000 a block of A.T.C. debentures to enable it to carry on certain construction operations (51a).

Series A. The offering circular, dated August 15, 1951 (Govt. Ex. 1, facing 636a), disclosed this advance purchase (Govt. Ex. 5, 51a). Series A, consisting of $299,500 of 6 percent twenty-year convertible debentures offered at 100 percent was sold by petitioner's office between September and November 1951 (46a, 302a-304a; Tr. 2111-2112). Cahn's fee for his legal services in connection with Series A was $3,500 (Tr. 437, 439) plus warrants for 35,000 shares of A.T.C. stock (Tr. 435-436; Govt. Ex. 1, p. 11, facing 636a; 326a, 328a).

Events before Series B. In December 1951, petitioner advised Cahn of his having learned of a dispute among A.T.C. directors, involving on one side Starr, the general manager, and, on the other, Proctor and Jones (52a-55a), the latter having become President of A.T.C. about the time Series A was issued (50a). Cahn went to Seattle, attended A.T.C. directors' meetings early in February 1952, and was himself elected a director; and Starr resigned (57a-78a; Govt. Ex. 6).

While in Seattle, Cahn was shown an audit of A.T.C. made by Lybrand, Ross Brothers & Montgomery (Govt. Ex. 7), which had turned the corporation's surplus of $1,500 shown in the Series A offering circular (Govt. Ex. 1, p. 13, facing 636a) into a deficit of $40,000 (70a), by reason of write-off entries (72a).

Cahn attended another directors' meeting in Juneau in April 1952 at which one Sim was retained as A.T.C.'s new general manager (84a-87a, 197a).

Cahn resigned as director in June 1952 (91a). In July 1952, he was advised by Jones (Govt. Ex. 10, 89a) that "the situation is much worse financially than we had been led to believe in April." In December 1952, Jones wrote petitioner telling of A.T.C.'s need for funds (Govt. Ex. 11, 94a-95a); and Cahn advised petitioner to have Jones and Proctor come to New York (95a, 102a).

Proctor arrived in New York in February 1953, and had lengthy talks with petitioner and Cahn, in which he detailed A.T.C.'s need for funds; that Starr had embezzled money, and that the long distance service of the Alaska Communications System, which connected the scattered city exchanges of A.T.C. with one another (113a), was about to be cut off because of nonpayment of bills (112a-113a). Proctor stated, however, that the fourth quarter of 1952 would show a profit or at least that the break-even point had been reached, as Sim, the new manager, "was doing such a terrific job" (107a-108a).

Despite his previous statements that A.T.C. should not undertake further public financing (72a-73a, 86a, 87a, 106a; cf. Govt. Ex. 18, 124a-127a), Cahn now proposed that Proctor prepare the draft of a new offering circular to include financial data that would show that the break-even point had been reached (108a-111a).

While Cahn was waiting for the data requested, he telegraphed Jones that Colonial Trust Co., trustee under the Series A indenture, had complained that A.T.C.'s advance deposits for interest requirements thereunder were past due (Govt. Ex. 15, 103a).

Jones' draft of a proposed offering circular (120a) being deemed insufficient (119a), Cahn went out to

Seattle in March 1953 (123a, 127a, 132a), emphasized to Proctor the necessity for full disclosure (128a-131a), and, working with Proctor, prepared the draft of the offering circular for proposed Series B with figures furnished by the company (133a-135a).

A.T.C. needed money more quickly than an audit could be prepared or paid for (109a, 111a, 135a), but A.T.C.'s figures were checked, and passed as a fair statement, by representatives of the Lybrand firm (137a-138a, 191a, 202a). The draft offering circular was then submitted to and discussed with the Seattle office of the SEC (136a-139a). The draft was thereafter taken to New York for printing (140a); petitioner made another agreement personally to purchase an amount of Series B debentures (140a-141a); and thereafter the proposed offering circular was filed with the SEC without material variations from the draft (141a-142a).

Series B. In due course, this series of bonds, dated as of April 1, 1953 (Govt. Ex. 19, facing 638a), was issued under a similar indenture of A.T.C. with Colonial Trust Co. as trustee (Govt. Ex. 22). Series B comprised $150,000 6 percent ten year convertible debentures; these were sold by petitioner's office to the public at $70 per $100 face value, with an underwriting discount of $10, making the proceeds to A.T.C. 60 percent of the face value of the issue, less estimated underwriting expenses of $10,000 (Govt. Ex. 19, p. 1). Cahn's fee for his services in connection with Series B was $3,000 (Tr. 689-690). The last sale of Series B took place in June 1953 (Tr. 747-748).

Meanwhile, on April 23, 1953, Cahn wrote Jones (Govt. Ex. 24, 156a-160a), saying that although this

case "has been quite a headache to all of us," he and petitioner both felt that "the company is now in a position to go forward and become a successful operation."

Events before Series C. About a month later, Jones sent Cahn a copy of A.T.C.'s report showing a loss for the first quarter of 1953 in the amount of some $6,600 (163a-164a); Cahn remarked to petitioner that he thought A.T.C. had passed the break-even point (164a) and wrote Jones that he was concerned at the discrepancy between the break-even representation in the Series B offering circular and this reported new loss (165a-166a).

Some time in the summer of 1953, Cahn saw the Lybrand audit for the year 1952 (Govt. Ex. 27), which showed a loss for 1952 of some $98,000 (166a-169a). If A.T.C. had made a little in the fourth quarter, as its figures showed (170a), or even had broken even, the year's loss would not have been so great (171a). Cahn and petitioner agreed that the loss was far greater than had been indicated to petitioner at the time of the Series B offering (172a).

On December 7, 1953, Proctor wrote petitioner (Govt. Ex. 28, 176a-178a), enclosing A.T.C.'s financial statement for the first three quarters; he said that there had been little if any improvement; that Sim had been released; that the office had been moved to Seattle with substantial savings; but that the tax liability, then $71,000, had become "increasingly serious"; and that "The essential thing is to obtain a breathing spell from the bond interest." Proctor asked petitioner to "advise what can be done in this emergency." Petition wrote in pencil on the letter, which he sent Cahn (174a), "see if we can put out more bonds" (179a).

Cahn, as a Government witness, testified he telephoned petitioner (179a). He then was permitted to testify, over objection based on the confidential character of the attorney-client communication (179a-180a; see Appendix C, *infra*, pp. A27-A35), as to what he then said to his client, the petitioner Tellier. The details of the objection are summarized below, pp. 14-16.

In substance, Cahn then testified that he told petitioner that a new public offering "would involve you in great trouble" (181a); A.T.C. "is selling bonds to keep alive"; "this selling of bonds to pay back interest by the sale of new bonds will involve you in a Ponzi scheme" (182a).

Cahn said he would write a letter to take petitioner "off the hook" with Proctor and Jones (190a). In that letter he set forth why, in Cahn's opinion, no further public financing was possible. He did not repeat therein his forceful warning about involvement in a "Ponzi scheme." Cahn sent petitioner an original and two copies (182a-185a; Govt. Ex. 29, 185a-189a), dated December 18, 1953 (185a). Cahn refused to participate further, and did not (190a).

Neither Jones nor Proctor ever received a copy of Cahn's letter (492a, 539a). When Jones telephone Cahn later, Cahn said he was too busy to handle any further A.T.C. issues (489a-490a, 492a). Cahn never told Jones that Series C should not be issued (503a).

Jones—who was a lawyer (Tr. 3051)—then proceeded to prepare the offering circular for Series C, and had numerous conferences and written communications with the Seattle office of the SEC concerning it (504a-512a). All SEC suggestions were adopted (528a). Petitioner printed the offering circular after Jones had initialed his final draft (402a).

In January 1954, Colonial Trust Co. had received a letter from Jones (Govt. Ex. 41, 206a, 207a-210a), which stated that A.T.C. was unable to pay its interest on Series A and B; that it was in default on conditional sales contracts; and that it owed taxes of some $70,000. The letter spoke of "the extremely glooming outlook at the present time," and of the possibility of "a race between the bondholders and Bureau [of Internal Revenue] as to who takes over." This letter was considered by Colonial Trust Co.'s trusteeship committee, which determined that the bank would act as trustee under the indenture for Series C (211a-214a; Govt. Ex. 42; 216a-221a). Cahn had told the Colonial Trust Co.'s vice-president that he would not be counsel on Series C, but did not say there should be no such issue (222a). Colonial Trust Co. did act as trustee under the Series C indenture (Govt. Ex. 46).

Series C. Series C, dated April 1, 1954, comprised $270,000 of 6 percent ten year convertible debentures, sold to the public at $70 per $100, with the same underwriting arrangement as on Series B (Govt. Ex. 47, facing 640a), and the bulk of it was sold by June 1954 (422a).

Most of the proceeds of Series C were applied, as Colonial Trust Co.'s officers knew they must be (214a-221a), to the payment of existing obligations of A.T.C., including interest payments on the two earlier issues (213a-214a).

The record discloses that although Colonial Trust Co. retained counsel, Messrs. Engel, Judge, Miller & Sterling, who prepared opinions attesting to the legality of each A.T.C. debenture issue (Tr. 716-717; 546a-552a), such counsel did not feel it necessary to ascer-

tain what use was or had been made of the proceeds of earlier series (551a-552a); and further discloses that the Vice-President of Colonial Trust Co. in charge of the bank's trust committee (206a) never examined the finances of A.T.C. (214a-215a), beyond reading Jones' gloomy letter (Govt. Ex. 41, 207a-210a).

The offering circular for Series C disclosed (Govt. Ex. 47, p. 5, facing 640a) that all but about $8,000 of the aggregate proceeds of $189,000 was proposed to be used for purposes other than new capital items.

Series D. A.T.C. was still in need of funds to finance plant expansion essential to increase earnings, and despite the fact that its operating losses were steadily decreasing (260a-262a), it was not showing a profit from operations. Accordingly, in November 1954, a new offering was considered (Tr. 3146). Jones again prepared the draft of an offering circular, which he submitted to the Seattle office of the SEC (Tr. 3146-3148). All of that agency's numerous suggestions were adopted (513a-517a, 520a-528a).

Series D dated December 1, 1954, comprised $158,000 of 6 percent ten-year convertible debentures, offered to the public at $70 per $100, with the same underwriting arrangements as in Series B and C (Govt. Ex. 57, facing 642a). Colonial Trust Co. was trustee under the indenture (Govt. Ex. 56). The last of the Series D debentures were sold in May or June 1955 (Tr. 3853-3854).

Subsequent Events. Despite increased earnings based on rate increases (493a-496a), A.T.C. could still not meet its obligations. In July 1955, A.T.C. made its last payment to Colonial Trust Co. to pay interest on debentures, and in August 1955, petitioner made an

advance of over $4,300 for that purpose (Tr. 815), for which he was never reimbursed (251a, 262a). The last interest payment to bondholders was made on September 1, 1955 (Tr. 821), and on September 18, Colonial Trust Co. sent the bondholders a notice of default (Govt. Ex. 64, Tr. 819-820), although some $13,000, sufficient for three more monthly payments, were still on hand, and are still held by Colonial Trust Co. (224a; Tr. 821).

A.T.C.'s officers proposed to their bondholders a plan of reorganization under Chapter XI of the Bankruptcy Act, and about 90 percent consented to the plan (501a, 518a-519a). At that point, however, the SEC intervened and forced A.T.C. into a Chapter X reorganization (497a-502a; 518a-519a), which is still pending though there has been no adjudication of bankruptcy (Tr. 3313).

The record discloses an SEC investigation of A.T.C. and of petitioner's firm, Tellier & Co. (270a-276a, 469a, 499a-500a), and shows that most of A.T.C.'s records are now in the hands of SEC (259a, 263a-265a, 473a-476a). The indictment followed (502a), on December 1, 1955 (1a). All of Cahn's files had earlier been turned over to the U. S. Attorney (200a) and were in that official's possession at the time of the trial (195a).

Vital Occurrences at the Trial

(a) *Disclosure over objection of Cahn's advice to his client Tellier.* The objection to the testimony of the Government witness Cahn as to his statement to his client Tellier, the present petitioner, was based on the circumstance that this particular communication with its reference to a "Ponzi scheme," unlike previous and other statements testified to by him, was intended to be,

and was, confidential. Cahn had testified that he regarded each issue as a separate matter, (12a-13a), and petitioner's counsel had indicated during the first portions of Cahn's examination that he was not waiving his right to object later (20a, 174a-175a). The prosecution argued that the conversation objected to by petitioner had been admitted at the first trial, and was moreover within the scope of a waiver executed by Tellier, authorizing disclosure by Cahn to the SEC.

Counsel for the petitioner stated that the conversation had been admitted at the first trial over his objection, and that, if the SEC waiver was relied on, he would show that it was obtained by duress.

The trial judge ruled that the alleged SEC waiver was confined by its terms to the SEC investigation and did not include use in a criminal trial.

However, the trial judge admitted Cahn's testimony over objection on the theory that since Cahn had been permitted to testify as to some conversations with his client—which had related to Series A and B—it was too late to object at this juncture to new conversations relating to one or more subsequent debenture issues; and he also rejected petitioner's contention that the present communication differed from the others.

By direction of the trial judge (Tr. 349, 359), the foregoing colloquy was treated as not part of the record of trial, but available for inclusion in an appendix to the brief on appeal. It is set forth in Appendix C, *infra,* pp. A27-A35.

The letter Cahn wrote petitioner following the conversation in question (Govt. Ex. 29; 185a-189a), on which the majority below relied to hold the conversation not privileged (*infra,* pp. A9-A12), was not in-

troduced by the prosecution at the trial until Cahn had first testified as to what he had told his client orally (180a-183a).

(b) *Admission of records of A.T.C., which was tried without appearing and without counsel, and of schedules and testimony based on such records, which were not shown to have been kept in the regular course of business.* A.T.C., although named as a defendant in the indictment (644a), did not appear to plead or to be tried, its Trustee in Chapter X proceedings having been instructed by the U. S. District Court for the Western District of Washington not to appear (2a). A plea of not guilty was entered on its behalf by the trial court (2a). At the commencement of the trial, petitioner objected to A.T.C.'s trial in those circumstances, on the ground that, since the corporation was unrepresented, evidence prejudicial to him was likely to be introduced (5a-8a).

The prosecution witness Casagrande, of the New York State Attorney General's Office, purported to identify a bulky mass of photostats, ten inches high, as being photostats of the books and records of A.T.C. (229a-241a). His testimony in substance was that he had gone to the office of A.T.C. in 1956, asked for the books and records, and had been given, by an unidentified person, certain books and records which he had caused to be photostated, and which photostated books and records constituted Government Exhibit 71 (232a). On objection that Casagrande's testimony was hearsay, the witness modified his testimony to state that the records given him purported to be the records of A.T.C. (230a).

When the first schedule, prepared by Casagrande and based on the photostats, was offered in evidence, objec-

tion was made by petitioner that the books and records themselves were not in evidence and, further, that the books and records themselves "have not been identified in accordance with the Federal Statute as records kept in the regular course of business, properly identified by one competent so to identify them" (234a). Counsel for the Government attempted to meet the first objection by offering Govt. Ex. 71 in evidence (234a); he made no effort to identify that exhibit further; and the court then overruled the objection, saying in substance that if the defendants could later prove that the contents of the exhibits were not what the witness Casagrande said they were, a motion to strike would be entertained (236a-237a).

Thereafter Casagrande introduced three schedules prepared by him (Govt. Ex. 76, 78, 80), which purported to set forth in summary form the differences between the use of the proceeds of Series B, C, and D contemplated by the respective offering circulars, and the alleged use made of those proceeds. Casagrande testified that each of those schedules was based in part on Government Exhibit 71 (245a-258a), and petitioner objected to each on that ground (250a, 253a-256a, 258a).

Petitioner then moved for an instruction limiting Government Exhibit 71 as evidence against A.T.C. only, and the judge reserved decision (262a-263a).

Government Exhibit 71 was subsequently identified, in part, as records of A.T.C. (478a-479a, 545a-546a). On the latter occasion, the judge said (545a), "71. This is what we don't like to refer to if we can help it." At the end of the case, the court denied petitioner's motion to limit Government Exhibit 71 to the corporation alone (563a).

As has been stated, *supra,* p. 5, no verdict was found against A.T.C., but it was sentenced none the less on the view (4a) "that verdict against Defts. Jones and Proctor may be treated as a verdict against Corporation." See also 625a-628a.

Proceedings in the court below. The judgments of conviction as to both petitioner and the appellant Proctor were affirmed below (*infra,* pp. A1-A19, A25-A26), Judge Lumbard voting, in a dissenting opinion, to reverse petitioner's conviction because of the violation of the attorney-client privilege (*infra,* pp. A19-A24).

(i) As to that point, the majority held (*infra,* pp. A9-A12) that, since the substance of what Cahn told his client Tellier was to be set forth in a letter to Tellier that the latter would forward to Proctor and Jones to get "off the hook" with them, the conversation itself was not privileged, "for the privilege attaches to the substance of a communication and not to the particular words used to express the communication's content" (*infra,* p. A12).

Judge Lumbard dissented (pp. A19-A24), on grounds sufficiently set forth in the following excerpts from his opinion: "The majority opinion means that an attorney by his very act of warning a client against imprudent and unlawful action is placing himself in the position of principal witness against the client he seeks to aid. * * * Thus it seems to me that the reasoning of the majority sucks all the vitality and usefulness from the attorney-client privilege; it whittles the privilege to nothing and, worse still, it makes the attorney a witness against his client. * * * The mere fact that some conclusions of the attorney-client exchange are to be conveyed to others is not an excuse or a reason for say-

ing that the parties did not intend any part of the exchange to be confidential. Such reasoning is contrary to the facts of life and to the implicit nature of man-to-man speaking; it eats the heart out of the attorney-client relationship. The privilege of the attorney-client relationship attaches to the particular words used or it is no privilege at all."

(ii) As to the A.T.C. books and records, the court below unanimously held (*infra*, p. A13) that "there was indeed insufficient competent evidence to establish that the books and records were kept in the ordinary course of business," but none the less held them admissible under *United States* v. *Feinberg*, 140 F. 2d 592 (C. A. 2), certiorari denied, 322 U.S. 726, to the effect that if a defendant has made representations concerning the financial condition of a corporation, the books of that corporation are competent evidence against him in a mail fraud prosecution. The opinion below did not discuss the requirements of regularity set forth in 28 U.S.C. § 1732(a) (*supra*, p. 3).

(iii) The remaining points decided below are not specified here, inasmuch as they were not sought to be further reviewed either on petition for rehearing below or in the present petition here.

REASONS FOR GRANTING THE WRIT

However much the issues now presented might be sought to be minimized by characterizing them as mere questions of evidence, in fact they involve protections of the individual as vital and as significant as any actually written into the Constitution.

The first of these is the attorney-client privilege, which, together with similar immunities attaching to communications with spouses, physicians, and priests,

protects from disclosure by trusted confidants communications that the privilege against self-incrimination protects from disclosure by the individual himself. The grave impairment of the attorney-client privilege sanctioned by the court below thus permits the Government, by compelling the attorney to testify, "to obtain disclosure in court of what is whispered in the closet" (Brandeis, J., in *Olmstead* v. *United States*, 277 U.S. 438, 473) just as effectively as if the utterance had been extracted from his client, the petitioner. In view of Criminal Rule 26 (*supra*, pp. 2-3), only this Court can reaffirm the basic protection that up to now had been inherent in the "wise and liberal policy" underlying the privilege.[1]

The second question presented involves a gross misreading of a remedial statute, 28 U.S.C. § 1732(a) (*supra*, p. 3). Designed to ameliorate the almost insuperable obstacles that the old shopbook rule had placed in the way of proof, the Act nonetheless circumscribed its liberality with the safeguard of regularity in order to protect parties against untrustworthy hearsay. The ruling below, which (contrary to every other decision on the point) excises from the statute the safeguard of regularity put there by Congress, calls for review here just as did *Palmer* v. *Hoffman*, 318 U.S. 109, where however the aberration sought to be

[1] "The protection of confidential communications made to professional advisers is dictated by a wise and liberal policy. If a person cannot consult his legal adviser without being liable to have the interview made public the next day by an examination enforced by the courts, the law would be little short of despotic. It would be a prohibition upon professional advice and assistance." *Connecticut Mut. Life Ins. Co.* v. *Schaefer*, 94 U.S. 457, 458, *per* Bradley, J.

read into the same statute had not found acceptance at any stage.

First. A fair reading of the decision below on the attorney-client privilege is that a conversation between attorney and client, otherwise privileged, ceases to be protected from disclosure whenever the conversation results in a communication to others concerning the same generalized subject-matter. Otherwise stated, any letter written to an outsider after a communication between attorney and client destroys the privilege which attached to that communication. This has never been the law up to now, and assuredly the holding does not reflect any peculiarity of local practice, for the state rule is to the contrary. See *Matter of Matheson,* 283 N.Y. 44, 46, 27 N.E. 2d 427.[2] There is no need at this juncture to spell out in detail the basic unsoundness of the opinion below; it is sufficient here simply to incorporate Judge Lumbard's strictures (*infra,* pp. A19-A24) by reference.

But it will not be inappropriate to dwell briefly on the significance of privileged communications as an element of the citizen's basic right to his security against arbitrary intrusion. Just as the Fourth Amendment (and, to some extent, the Fourteenth, see *Wolf* v. *Colorado,* 338 U.S. 25, 27), protect against unreasonable searches, just as the Fifth and the Fourteenth protect against extortion of testimony from the individual himself, so does the privilege attaching to communications

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[2] "Even though the deceased had expressed the same testamentary intention in the presence of the same witness and others just previous to the private interview, the very fact that he repeated it in the more intimate private conference with his attorney had an important bearing on the sharply-contested issues, particularly that of undue influence. It is on this error that our reversal rests."

by and with spouses, attorneys, physicians, and priests delineate an area of privacy protected against intrusion even by the Government itself. The essential social interest served is the same. And for the same reason that waivers of the privilege against self-incrimination are to be narrowly construed (*Emspak* v. *United States*, 349 U.S. 190, 196-198, and cases there cited), so there should be no fashioning of a waiver out of thin air, as the court below plainly did in the present case, in order to force an attorney to testify against and assist in convicting his erstwhile client.

Significantly enough, while the district court found a waiver in what had preceded Cahn's "Ponzi scheme" testimony (pp. 14-16, *supra;* Appendix C *infra,* pp. A27-A35), the court of appeals looked to the letter sent after that conversation took place, a letter that was introduced at the trial only after the conversation in question had already been testified to. Otherwise stated, the court of appeals was not prepared to approve the admission of the conversation on the grounds of prior waiver that the district court had espoused. Those grounds, as we show briefly in the margin lest they be availed of here as alternative grounds for affirmance (*United States* v. *American Ry. Exp. Co.*, 265 U.S. 425; *Oklahoma* v. *Civil Service Commission,* 330 U.S. 127, 134), are plainly without merit.[3]

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[3] Cahn testified (12a-13a) that each series of A.T.C. debentures was a separate transaction. Consequently even if there had been a waiver as to otherwise privileged conversations dealing with Series A and B, that waiver would not have extended to the present conversation, which dealt with what became Series C. Cf. *Magida* v. *Continental Can Co.*, 12 F.R.D. 74, 77 (S. D. N. Y.). Moreover, many of the previous conversations were not intended to be confidential, either because third persons were present or because the advice dealt with financial rather than with legal matters

The majority below did not express disagreement with Judge Lumbard's conclusion (*infra,* p. A24) that "If the admission of the evidence was error, I think it follows that it was so harmful to Tellier's defense that his conviction should be reversed"; and indeed the prosecutor's conduct at the trial established the pivotal importance of that evidence.

The prosecutor was not satisfied with the later letter on which the court below relied; he was determined to burn into the jury's mind that single explosive expression—a "Ponzi scheme"—from a private telephone conversation between a lawyer and his client. Those ringing words were used in the prosecutor's opening statement (Tr. 35); he made a determined and ultimately successful effort to have this conversation admitted (Tr. 344-360; Appendix C *infra,* pp. A27-A35); and he recurred to that expression no less than four times in his summing up (Tr. 4096, 4097; 564a, 565a).

A "Ponzi scheme"[4]—that phrase of petitioner's own lawyer was used to make an indelible impression on the jury, and of course it did; once uttered, it colored the whole trial beyond possibility of repair. As Mr. Justice Cardozo said (*Shepard* v. *United States,* 290 U.S. 96, 104), "The reverberating clang of those accusatory words would drown all weaker sounds." Not only do the prosecutor's repeated references to and reliance on "Ponzi scheme" establish its signifi-

(29a, 78a, 117a-118a). Finally, petitioner's counsel made it abundantly clear, during Cahn's examination as to the first two series, that he was not waiving his right to object later (20a, 174a-175a).

[4] For the details of the original Ponzi scheme, see *In re Ponzi,* 268 Fed. 997, 1000, and *Lowell* v. *Brown,* 280 Fed. 193, 196-197, both D. Mass.

cance in the present connection,[5] they also emphasize the unanswerable soundness of Judge Lumbard's observation (*infra*, p. A23) that "The privilege of the attorney-client relationship attaches to the particular words used or it is no privilege at all."

Conversations between attorney and client are not subject to motions to suppress. See Criminal Rule 41(e); *In re Fried*, 161 F. 2d 453 (C. A. 2), certiorari granted *sub nom. United States* v. *Fried*, 331 U.S. 804, and dismissed, 332 U.S. 807; *Centracchio* v. *Garrity*, 198 F. 2d 382 (C. A. 1), certiorari denied, 344 U.S. 866; *Lapides* v. *United States*, 215 F. 2d 253 (C. A. 2); *Biggs* v. *United States*, 246 F. 2d 40 (C. A. 6), certiorari denied, 355 U.S. 922. Their protection therefore depends on rulings on "evidence" made at the trial, rulings which, inescapably, must be fashioned by this Court for the trial of every criminal case in the federal courts. Criminal Rule 26 (*supra*, pp. 2-3); *Funk* v. *United States*, 290 U.S. 371; *Wolfle* v. *United States*, 291 U.S. 7. Indeed, Rule 26 specifically speaks of "privileges of witnesses" as a matter to be determined by common law principles in the light of reason and experience. Review by this Court is therefore required lest the protection traditionally and because of high public policy accorded private conferences between a lawyer and his client be sharply curtailed—as in this case—to the point of virtual disappearance.

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[5] "When a district attorney so urgently relies upon incompetent evidence for the conviction of a defendant we feel quite confirmed in our opinion that it was important and not at all negligible." *People* v. *Sing*, 242 N.Y. 419, 424, 152 N.E. 248, 249; *People* v. *Rosenthal*, 289 N.Y. 482, 488, 46 N.E. 2d 895, 899.

Second. What is now 28 U.S.C. § 1732(a) (*supra*, p. 3), was first enacted in 1936[6] in order to ameliorate the stultifying harshness of the common law shop-book rule, which, in the face of modern business and bookkeeping methods, effectually prevented proof of many normal business transactions.[7] The statute effected this amelioration by rendering admissible what was plainly hearsay, but provided a safeguard of trustworthiness in the requirement that the entries first be shown to have been made in the regular course of business.

In *Palmer* v. *Hoffman*, 318 U.S. 109, this Court held that the expression "regular course of business" meant just that, and did not include accident memoranda dictated by railroad employees. Such memoranda, the Court said (p. 114), "are calculated for use essentially in the court, not in the business. Their primary utility is in litigating, not in railroading."

The present case illustrates another—and much more harmful—disregard and indeed abandonment of the safeguards of the statute. The Act makes the underlying business records here in question admissible only [1] "if made in regular course of any business, and [2] if it was the regular course of such business to make such memorandum or record at the time or within a reasonable time thereafter." Here the court below

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[6] Sec. 1 of the Act of June 20, 1936, c. 640, 49 Stat. 1561; later 28 U.S.C. [1940-1946 eds.] § 695; after 1948, 28 U.S.C. § 1732; since 1951, 28 U.S.C. § 1732(a).

[7] See H.R. Rep. 2357 and Sen. Rep. 1965, both 74th Cong., 2d Sess.; Morgan *et al.*, *The Law of Evidence: Some Proposals for its Reform* (Commonwealth Fund, 1927) 51-63 (Proof of Business Transactions to Harmonize with Current Business Practice); 5 Wigmore, *Evidence* (3d ed. 1940) §§ 1520-1530.

conceded that this requirement was not met, saying (*infra*, p. A13), "An examination of the record indicates that there was indeed insufficient competent evidence to establish that the books and records were kept in the ordinary course of business." Yet it upheld their admission none the less.[8]

Plainly, therefore, there has been no compliance with the statute, since, as the court below frankly admitted, there was no proof of the necessary foundation of regularity which is prerequisite to the admissibility of business entries. *Pulley* v. *United States*, 253 F. 2d 796, 797 (C. A. 8); *United States* v. *Indian Trailer Corp.*, 226 F. 2d 595, 599-600 (C. A. 7); *Bruce* v. *McClure*, 220 F. 2d 330, 334-336 (C. A. 5); *Hartzog* v. *United States*, 217 F. 2d 706, 710 (C. A. 4); *NLRB* v. *Sharples Chemicals*, 209 F. 2d 645, 653 (C. A. 6); *Schmeller* v. *United States*, 143 F. 2d 544, 550 (C. A. 6); *Smith* v. *Bear*, 237 F. 2d 79, 88-89 (C. A. 2); *United States* v. *Grayson*, 166 F. 2d 863, 869 (C. A. 2). What has happened, therefore, is that, in the face of the clear words of the statute, books of a corporation not shown to have been kept in the regular course of business as required by its explicit terms, have been erroneously admitted over articulated objection for the truth of the matters contained therein. As Judge L. Hand said in *United States* v. *Grayson*, *loc. cit. supra*, this is "multiple hearsay," admissibility of which involved a complete disregard of the statute, and which, in the setting of the

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[8] Because he deems it a question outside the appropriate scope of the writ of certiorari, petitioner does not ask this Court to review the holding below that, on the entire record, the prosecution had *prima facie* established the genuineness (as distinguished from the regularity under the statute) of what was comprised within Govt. Ex. 71.

present case, was error plainly substantial in character.[9]

The Court below rested its ruling on *United States* v. *Feinberg*, 140 F. 2d 592 (C. A. 2), certiorari denied, 322 U.S. 726. If that case had simply held that, in a mail fraud prosecution, a defendant making representations regarding a corporation is chargeable with all of that corporation's books where he himself had control of the corporation, petitioner here would not quarrel with the holding, though it would be inapplicable to his situation: Petitioner was not in control of A.T.C., he was neither an officer nor a director thereof, and he owned no stock therein; he was merely the best-efforts underwriter for its debentures, and indeed was taxed by the prosecution for having owned none of those himself (Tr. 2062-2063, 4111; U. S. Br., C. A. 2, 28).

But *Feinberg* actually went farther. The court there said (140 F. 2d at 596) that books of a corporation were competent against one not in control "under our decision in Parker v. United States, 2 Cir., 203 F. 950, where we held that when the accused, in a prosecution involving the fraudulent use of the mails, had made representations as to the financial condition of a cor-

[9] Govt. Ex. 71, the photostats of A.T.C.'s books and records, was the basis, not only of the witness Casagrande's oral testimony, but also of his three schedules that purported to set forth in summary form the differences between the use of the proceeds of Series B, C, and D that was contemplated by the respective offering circulars, and the use that was allegedly made of those proceeds (Govt. Ex. 76, 78, 80). That oral testimony and those schedules—each of which was duly objected to by Tellier on the specific ground that it was improperly based on Govt. Ex. 71 (250a, 253a-256a, 258a)—went to the very heart of the alleged misrepresentations charged in the indictment, and thus contributed significantly to the verdict.

poration, the books of account of that corporation are competent against him." But this was a misreading of *Parker*.

Parker in fact laid down no such broad rule and simply followed the earlier decision on Parker's co-defendants' separate writ of error, *Wilson* v. *United States*, 190 Fed. 427 (C. A. 2); see 203 Fed. at 951, where the Second Circuit said, "We approved the admission of this documentary evidence in the Wilson Case and fail to see why the principles there laid down are not controlling here." But *Wilson* in turn involved regular entries; see 190 Fed. at 437: "* * * a person who makes statements concerning the condition or affairs of a corporation is not in a position to object when the *regular* books of the corporation are used against him." [Italics added.] Indeed, *Wilson* having been decided in 1911, some twenty-five years before the regular business entry statute, the matter of the regularity of the books there involved was discussed at considerable length (190 Fed. at 436-438). Thus *Feinberg* plainly misread the precedent on which it purported to rely.

The court below in the present case, by perpetuating the *Feinberg* misreading of the earlier decisions, has effectually cut the safeguard of regularity out of the statute. It has therefore eliminated the requirement of the foundation of regularity upon which every other circuit has insisted (*Pulley* v. *United States*, 253 F. 2d 796 (C. A. 8); *United States* v. *Indian Trailer Corp.*, 226 F. 2d 595 (C. A. 7); *Bruce* v. *McClure*, 220 F. 2d 330 (C. A. 5); *Hartzog* v. *United States*, 217 F. 2d 706 (C. A. 4); *NLRB* v. *Sharples Chemicals*, 209 F. 2d 645 (C. A. 6); *Schmeller* v. *United States*, 143 F. 2d 544 (C. A. 6)), and which has similarly been insisted

on by every state court dealing with identical legislation. E.g., *Matter of Roge* v. *Valentine*, 280 N.Y. 268, 278, 20 N.E. 2d 751, 755.[10]

As the matter now stands, 28 U.S.C. § 1732(a) has been held to authorize multiple hearsay, and to charge a defendant, not only with a corporation's regular business entries, but with the truth of the matters stated in any paper found on its premises, wholly without proof of their regularity.[11] We believe that this mutilating rewriting of an Act of Congress should not go unreviewed.

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[10] "It does not sufficiently appear in this case that the notations on the record cards and check stubs were made in the regular course of business and at the time of the transaction noted or within a reasonable time thereafter. Technical defects might be disregarded, but here the defects are more than technical. Notations made by third persons, records of past transactions have probative force only when made under conditions that at least provisional confidence can be placed in them. The statute defines the conditions which in the opinion of the Legislature would give to the notation of records sufficient assurance of verity that they might be accepted provisionally as proof of the facts stated. In this case there is a complete lack of proven basis for such assurance of verity."

Numerous states have statutes identical with or similar to 28 U.S.C. § 1732(a). See 5 Wigmore, *Evidence* (3d ed. 1940 and 1957 Pocket Supp.) § 1520. For other state cases rejecting evidence thereunder for want of a proper foundation of regularity, see *Williams* v. *Caples*, 342 Pa. 230, 235, 20 A. 2d 302, 304-305; *In re Daniel's Estate*, 185 Ore. 642, 653-654, 205 P. 2d 167, 172-173; *Kane* v. *Pear*, 343 Ill. App. 352, 98 N.E. 2d 857.

[11] The conglomerate mass of unrelated papers contained in Government's Exhibit 71 is itemized in Appendix D *infra*, pp. A36-A39.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

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